merely responds reasonably to an aggressive act, or to a deliberate provocation, by the accused, self-defence is not then available to the accused.

However, determining who the original aggressor was will often be irrelevant. In *Harvey* [2009] EWCA Crim 469, a street fight involving a number of people resulted in one of them being prosecuted for assault occasional bodily harm, entailing biting another's nose. It was not clear how the fight had started, or who was the original aggressor, nor the precise circumstances in which the biting had taken place. The appellant, claiming self-defence, gave evidence that she had bitten the victim at a point when she was pinned to the ground by the victim. The prosecution case was that the appellant was the aggressor and knew that she did not need to resort to violence. In directing the jury, the trial judge "faithfully tried to follow *Rashford*" (at [18]). However, the Court of Appeal questioned whether it was necessary to deal with the law relating to reliance by an initial aggressor on self-defence:

> "Whilst the appellant's alleged initial abuse in the cab office might have provoked the complainant, there was no violence until both ladies approached each other in the middle of the road and started to pull each other's hair. The real issue was not who started the fight but the circumstances in which the appellant bit [the complainant's] nose." (at [19])

Determining who the original aggressor was is not normally likely to be of assistance to the accused. If the victim was the original aggressor, then the accused will be judged by reference to his or her honest belief as to whether the use of force was reasonably necessary and as to the degree of force used. If the accused was the original aggressor, to which the victim reasonably responded, self-defence would not be available

> "it is not enough to bring self-defence into issue that a defendant who started the fight is at some point … getting the worst of it, merely because the victim is defending himself reasonably". (*Keane* at [18])

If the original aggressive act by the accused provoked an unreasonable response from the victim, so that the roles are reversed, then again a claim of self-defence will be judged by reference to the necessity of the use of force and the degree of force used by the accused.

Report by Dilys Tausz, Barrister
Commentary by Ed Cape

Fresh Evidence on Appeal

R. v George (Dwaine)

Court of Appeal (Criminal Division): Sir Brian Leveson P, Green and Globe JJ: December 9, 2014; [2014] EWCA Crim 2507

Criminal Cases Review Commission referral—conviction for murder—presence of a small amount of gunshot residue found on coat said to belong to defendant—

whether sufficient amount to be of evidential significance—impact of Forensic Science Service 2006 Guidelines—whether conviction safe

Admissibility; Expert evidence; Forensic evidence; Fresh evidence; Murder; Unsafe convictions; Weight of evidence

The appellant was convicted of murder, attempted murder and possession of a firearm following a shooting in July 2001. The prosecution case was that the appellant and another man (Brown) were responsible. The firearm used, a Walther PPK self-loading pistol, was recovered from the home address of a co-accused, Cunningham. Cunningham said that he was minding the gun for another man, Loftus, who had telephoned to say that the appellant would collect it. He described how a car arrived with the appellant driving. Brown got out and collected the gun from him. The evidence against the appellant was entirely circumstantial and based on four limbs: (i) the factual background to the relationships between the various participants leading up to the shooting; (ii) the identification evidence of Cunningham; (iii) the evidence of voice identification; and (iv) the presence of gunshot residue on a coat. The coat, a black Henri Lloyd hooded jacket, was found at the appellant's home address. The appellant denied ownership. Subsequent analysis found that it bore gunshot residue. David Collins of the Forensic Science Service (FSS) gave evidence. He referred to finding two particles containing lead, barium and antimony; one particle containing barium and aluminum on the front of the coat; and one particle containing barium and aluminum in the pocket. He found particles containing lead, barium, antimony and aluminum on the spent cartridges at the scene. He concluded that the coat had an association with a shooting incident, but it was not possible to establish a link with a particular shooting. The prosecution asserted that this was evidence supportive of the appellant having been the gunman. The defence asserted that the particles could have arisen from sources other than the shooting. At trial the appellant's defence was one of alibi. His counsel asserted that the gunshot residue on the coat could have been the product of secondary transfer. Following his conviction the appellant made an unsuccessful application to the Court of Appeal. Subsequently the Criminal Cases Review Commission (CCRC) decided to refer the case back to the Court of Appeal on the basis primarily of a scientific re-evaluation of the significance of gunshot residue generally. This followed the issuing of guidelines by the FSS on July 19, 2006 on the "assessment, interpretation and reporting of firearms chemistry cases" (hereafter 2006 Guidelines). The 2006 Guidelines identify ammunition types, how particles are formed in the discharge of a firearm (including other possible sources of such particles such as fireworks, nail guns and brake linings) and the possibilities of secondary transfer. It classifies the number of gunshot residue primer particles into reporting levels of "low" (1–3 particles), "moderate" (4–12 particles), "high" (13–50 particles) and "very high" (greater than 50 particles). The CCRC argued that the number and type of particles of residue found on the coat were so small so as to be at or near the level at which they could not be considered to have evidential value. The CCRC obtained fresh evidence in the form of an expert report prepared by Angela Shaw. The prosecution did not oppose the admission of Ms Shaw's evidence. Following a re-examination of the coat Ms Shaw found that only

the two particles on the coat containing lead, barium and antimony could be said to be characteristic of gunshot residue. The two particles containing barium and aluminum were indicative of gunshot residue, but could also have originated from other sources, such as fireworks. An additional indicative particle containing barium and aluminum was found on the front of the coat. This also could not be said to be gunshot residue. Applying the 2006 Guidelines, Ms Shaw considered that very little by way of interpretation could be applied to finding such low levels of gunshot residue, not least because of the lack of background data on residue in the external environment. She concluded that the particles could be related to a shooting; or to the dummy cartridge; or picked up unknowingly from the environment.

Held, allowing the appeal, the 2006 Guidelines had no force in law, but were indicative only of the current state of the science. The fact that scientists had adopted a cautious approach to reporting low levels of residue (i.e. 1–3 particles) such that for that residue, on its own, no evidential significance could be attached to it did not mean that the evidence was necessarily inadmissible or irrelevant. A jury was more than able to assimilate evidence as to potential significance or lack of significance of recovered evidence, provided that there was an appropriate explanation of that potential significance, for example, by reference to what might occur in the environment or might otherwise be the consequence of entirely innocent contamination. In the present case, there was no basis for challenging the trial judge's decision to admit the evidence of gunshot and neither did the new evidence provided by Ms Shaw justify such a view. However, it was not fanciful to suggest that the evidence relating to the gunshot residue was seen by the jury as providing important independent support for the weak identification of Cunningham and the weak voice identification ((ii) and (iii) above). The final plank of the prosecution's case ((i) above), namely the background events, provided critical context, but was not probative of involvement in murder. Accordingly, the conviction was unsafe and would be quashed.

Cases considered: George (Barry) [2007] EWCA Crim 2722; (2007) 151 S.J.L.B. 1498; *Joseph* [2010] EWCA Crim 2580.

J. Wood QC and *T. Okewale* for the appellant.
R. Whittam QC for the Crown.

Commentary

Fresh evidence based on advances in science. The Court of Appeal admitted the fresh expert forensic evidence partly on the basis of the guidelines issued by the FSS. These were drafted in 2006, some four years after the trial. The court accepted that this represented a change in the scientific interpretation of such evidence and that the guidelines were "indicative of the current state of the science". Post-trial advances in science have been accepted as a "reasonable explanation" for failing to adduce the evidence at trial under s.23(2)(d) of the Criminal Appeal Act 1968. For example, in *Campbell* [1997] 1 Cr. App. R. 199; [1997] Crim L.R. 227, advances in medical science in the intervening decade between trial and appeal allowed a fuller explanation of the impact of the appellant's epilepsy on his offending; in *Hobson* [1998] 1 Cr. App. R. 31; [1997] Crim L.R. 759, it was held to be a matter of significance that "battered women's syndrome" was not part of the British

Classification of Mental Diseases until two years after the trial; in *Billy-Joe Friend* [2004] EWCA Crim 2661, the court admitted evidence of the defendant's ADHD on the basis that there was greater knowledge of this area than at trial; in *Cannings* [2004] EWCA Crim 1; [2004] 1 W.L.R. 2607, it was held that fresh evidence included "research published post trial … into SIDS"; and in *Hodgson* [2009] EWCA Crim 490 at [6], the court concluded that "advances in the science of DNA, long after the end of the trial, … would … have resulted in a quite different investigation and a completely different trial". However, the suggested post-trial advances will be scrutinised by the court for reliability. In *Young v HM Advocate* [2013] HCJAC 145, the High Court of Justiciary in Scotland held that "Case Linkage Analysis" was a science in its infancy and not yet reliable. There have also been serious concerns about the prosecution's reliance on certain new areas of science, for example in relation to facial mapping: *Gray* [2003] EWCA Crim 1001; and identification by ear prints: *Dallager* [2002] EWCA Crim 1903; [2003] 1 Cr. App. R. 12.

The court's approach to fresh expert evidence. The Court of Appeal (at [38]) stated that it was "mindful of and [shared] the cautious approach to fresh expert evidence", and referred to *Jones* [1997] 1 Cr. App. R. 86 (where Lord Bingham CJ warned of the need for defendants to call all available expert evidence at trial and not seek to simply re-run the case on appeal based on an expert with a different opinion).

The Court of Appeal has deprecated the idea of "expert shopping" until one is found to support a new diagnosis or conclusion. (See *Horton* [2007] EWCA Crim 607 at [16]; *Chatoo* [2012] EWCA Crim 190 at [70] and [71].) Moreover, in *Kai-Whitewind* [2005] EWCA Crim 1092; [2005] 2 Cr. App. R. 31 (p.457), Judge LJ (as he then was) cautioned against the reliance, on appeal, on expert evidence that was only a "substantial enhancement", or "repetition or near repetition" of the trial evidence. In *T (MC)* [2008] EWCA Crim 3229 at [33], Moses LJ went further and opined that the fresh expert evidence had to falsify and destroy

> "the basis on which the earlier conviction was obtained … It is not sufficient that it merely demonstrates that the original evidence from experts might have been assessed in a different way or a different conclusion on the expert evidence part of the case might have been reached unless it strikes at the fundamental basis upon which the verdict rested."

Whilst these high thresholds can be understood as discouraging unmeritorious attempts to simply re-run the trial issues, they are less understandable if they prevent the admission of fresh evidence that does provide a different perspective of the case at trial that might well have affected the jury's decision to convict, because it is labelled a "substantial enhancement" of the earlier evidence, or where it does less than falsify and destroy the trial evidence. The overriding test in s.23(1) is that the admission of the fresh evidence should be "in the interests of justice". This is to be read in conjunction with s.2, which requires the quashing of a conviction if it is "unsafe". It is arguable that any restrictions beyond these statutory phrases place far more onerous burdens on an appellant than was intended either by the drafters of s.23 (brought in following a series of high-profile miscarriage of justice cases with a view to the court taking a more generous approach to the admission of fresh evidence), or by Lord Bingham in the House of Lords decision in *Pendleton* [2001] UKHL 66; [2002] 1 W.L.R. 72; [2002] 1 Cr. App. R. 34 (p.441), where (at [19]) he proposed that in any case of difficulty the court should test its provisional conclusion regarding the impact of fresh evidence by asking itself "whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict". This is the so-called "jury impact test" (cf. *Noye* [2011] EWCA Crim 650.)

Indeed, in the present case, the court did allow the appeal despite the fact that the fresh evidence did not "falsify and destroy" the trial evidence. At trial, the prosecution expert did not disagree with the propositions that the particles could have come from sources other than the shooting (including blank firing guns, nail guns and the dummy cartridge), and that it would be unsafe to link the gunshot residue on the coat with the shooting (at [20] and [31]). The concern that led to the quashing of the conviction was that, despite the trial judge leaving open the possibility that the particles had no significance, he did not differentiate between the nature and value of the different particles. The fresh evidence would have required a summing up that was "couched in terms of much greater circumspection and caution" (see [48] and [49]). In other words, the fresh evidence added a different perspective to the prosecution case at trial.

The court went on to consider the ultimate question, namely whether the fresh evidence rendered the convictions unsafe, and in doing so considered the "jury impact test" and asked itself whether the fresh "evidence might reasonably have led to an acquittal" (at [50] and [51]). (See *Lundy* [2013] UKPC 28; *Pendleton* at [19].) It concluded that it "might reasonably have affected the decision of the trial jury" (at [51]).

Report by David Hargreaves, Solicitor
Commentary by Paul Taylor, Doughty Street Chambers

Liability for Breach of Reporting Restrictions

Aitken v Director of Public Prosecutions

Divisional Court: Bean LJ, William Davis and Warby JJ: April 23, 2015; [2015] EWHC 1079 (Admin)

Article published in local newspapers identifying school where victim a pupil in breach of reporting restrictions—whether editor of newspaper a person "who publishes any matter"—whether editor guilty of offence—Children and Young Persons Act 1933 s.39(2)

Breach; Criminal liability; Editors; Newspapers; Publishing; Reporting restrictions; Statutory interpretation

The appellant was the editor of a regional paper, which published a court report. He was charged with contravening a reporting restriction in breach of an order imposed under s.39 of the Children and Young Persons Act 1933. At the magistrates' court the appellant submitted that there was no case to answer because an editor of a newspaper did not fall within the expression "any person who publishes" since the statutory words denoted "the publisher", as opposed to any other person involved in the publication process. That submission was rejected and the appellant changed his plea to guilty. The appellant appealed by way of case stated. He submitted, inter alia, that a penal statute had to be construed strictly and conservatively. He referred to other statutes, which specifically criminalised